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Opinion after order vacating prior opinion

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TIA TRANNELL BROWN, Defendant and Appellant.	F067700 (Super. Ct. No. CRF39874) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

Stephanie L. Gunther, under appointment by the Court of Appeal, for Defendant and Appellant.

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* Before Gomes, Acting P.J., Kane, J., and Chittick, J.†

† Judge of the Fresno Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Larenda R. Delaini, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant, Tia Trannell Brown, of assault with a deadly weapon (count I/Pen. Code, § 245, subd. (a)(1))[1] and inflicting corporal injury on a cohabitant (count II/§ 273.5). On appeal, Brown contends the court committed instructional error. Respondent contends the court erred by its failure to impose certain mandatory assessments. We will find merit to respondent's contention, modify the judgment, and affirm as modified.

FACTS

The Prosecution Case

William Christian testified he had known Brown for six or seven years since they were in junior high school. In late September or October of 2012, Brown needed a place to stay. After Christian offered to let her stay with him, she moved with all her clothes and other belongings into Christian's dorm room at Columbia College where he was attending school.

Christian lived with a roommate in a dorm suite that included two bedrooms. Brown had full access to Christian's dorm room and kitchen facilities. Christian paid for all of the living expenses including food and cigarettes. However, Brown told him that as soon as she found a good job she would move out of the dorm. She had been looking for work and was about to start a job at McDonald's. Brown did not own a car and depended on Christian to drive her around. During her stay in Christian's dorm room, he and Brown shared a bed every night and, according to Christian, they had sex about 20 times.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

On November 11, 2012, Christian went to the hospital suffering from chest pains and indigestion and was given a prescription for an antacid which he did not fill. The following morning during an argument about Christian's failure to seek additional medical attention, Brown stated, "[Y]ou really are a bitch for not going to the doctor." When Christian responded, "Whatever, bitch," Brown punched him five to six times in the head and face which caused bruising and swelling.

After Christian checked himself in a mirror in the bathroom, they apologized to each other and Christian decided to go see a doctor. However, in order to cool off, Christian suggested to Brown that they first visit a friend in Groveland and she agreed. The couple left in Christian's pickup with Christian driving. Several minutes later Brown told Christian, "You know, you really are a bitch for not hitting me back." After Christian responded, "I'm not going to hit you," Brown replied, "Come on. You flinch and you get hit." Brown then attempted to make Christian flinch by punching at him so that her fist came within inches of his face. Christian told her to stop but instead of stopping, when Christian flinched, Brown punched him in the head and face.

Christian turned the truck around to return to his dorm room and Brown asked him where he was going. He responded, "I'm going home. I've had enough of you. You're a poor excuse [for] a woman." Brown became very angry and started punching Christian harder. When Christian told her to stop, she replied, "You should have never called me a bitch in the first place." Brown then threw Christian's cell phone on the truck's floorboard. Christian responded by taking Brown's cell phone from the center console and dropping it out of the window. This prompted Brown to start screaming in his ear, "Give me back my phone." Meanwhile, out of the corner of his eye, Christian saw Brown go into her purse and then he saw a silver glimmer. Brown attempted to stab Christian with a kitchen knife. Christian tried to block the knife with his right arm four to six times and received several cuts.

After Brown stopped attacking him, Christian pulled off the road and told her to calm down. At that moment a forestry service truck came up from behind and pulled over on the opposite side of the road. Christian yelled out, "Help. She's trying to stab me." Meanwhile, Brown got out of the truck, walked over to the man in the forestry truck with the knife in her hand and told him that Christian was trying to stab her. The man told Brown to calm down, get in the truck, and go home.

Brown got back in Christian's truck and told Christian that he was going to find her phone. Christian agreed and drove back to where he thought he dropped it. He got out of the truck and walked along the highway looking for the phone with Brown following. Every time a car passed by and left their view, Brown would kick Christian. When Christian saw an ambulance passing by, he flagged it down and told its occupants Brown was trying to stab him. Eventually, Tuolumne County Sheriff's Deputies arrived on the scene. Christian told the deputies that he and Brown were "friends with benefits."

Christian further testified that he and Brown were having troubles with their relationship and that Brown would get mad when he would tell her that she was being flirtatious with other men. He would have liked for Brown to have been his girlfriend but it seemed that Brown disliked him more every day they were together. Brown did not want anyone to know about their relationship and did not want to talk about it. Nevertheless, they last had sex the night before Brown assaulted him.

Tuolumne County Sheriff's Deputy Richard Champlin testified that at around 11:41 a.m. on November 12, 2012, he responded to a dispatch regarding an altercation involving a male and a female and spoke with Christian. Deputy Champlin had to calm Christian down because he was upset and visibly shaking. Christian had marks and cuts on his arm and his nose had a red mark and appeared to be swollen. Christian told the

deputy that earlier he had been in a fight with his girlfriend,[2] Brown, and that she had hit him in the face "a couple of times." Christian also told the officer that he received the marks and cuts on his arms while trying to fend off Brown's attempts to stab him with a knife. On the floorboard of the passenger's side of the truck, Deputy Champlin found a knife that matched Christian's description of the knife Brown used to assault him.

Champlin contacted Brown at the point that she was going to be arrested. Brown was verbally aggressive and repeatedly asked whether Christian was going to be arrested. Brown had a small scratch an inch and a half long on the palm of her left hand that she said was caused when she broke the blade of a knife.

Tuolumne County Sheriff's Sergeant Matthew Zelinsky testified that he interviewed Brown after responding to the scene. Brown did not appear to be afraid of Christian. She told Sergeant Zelinsky that at 9:00 or 10:00 a.m. that morning she and Christian began arguing about Christian's medical problem. She said Christian was drinking even though he had a hole in his esophagus and she called him stupid and told him to stop. After Christian called her a bitch and swung his arm toward her, Brown got mad and punched him several times in the face. Christian then pulled out a small kitchen knife and she laughed at him.[3] However, she did not see from where he got the knife.

Afterwards, she and Christian got into a vehicle and began driving to a friend's house in Groveland. En route, Christian asked to use her cell phone. She handed it to him, but when she asked for it back because she had not finished a text message, Christian acted like he did not hear her. Christian then held her phone out of the window

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2 Christian also told Deputy Champlin that he and Brown had been dating for the past two months.

3 Sergeant Zelinsky testified it was very hard to get information from Brown because she would not answer all the questions, she did not provide specifics, and she would change the subject. She was also vague in her answers and she did not provide the deputy with important details about the knife incident.

and dropped it. Brown started calling Christian names and told him to pull over and look for her phone. Christian then pulled out a small kitchen knife and put it to her left shoulder area. Brown grabbed the blade, broke it and threw it out the window. Afterwards, Christian pulled off the road and went to look for her cell phone. A sheriff's deputy then drove by and she flagged him down. Brown told the deputy that Christian had just tried to stab her. The deputy told her that they were not in his jurisdiction and for her to throw the knife away and continue on to where she was going.[4]

The only injury Brown had was a scratch about an inch and a half long on the palm of her left hand that she claimed she got when she grabbed the knife and broke it. After Christian called her a bitch, he swung his arm at Brown and that was when she had to "mix it up" with him[.]

The Defense Case

Brown testified she moved in with Christian in September or October of 2012 because she had personal problems at home and needed a place to stay. Although she slept with Christian in his bed, she considered him a friend, not a boyfriend, and she had sex with him only once. Brown was attracted to Christian only intellectually, not physically, and he manipulated her into having sex the one time by reminding her that he was providing her with room and board. Brown cooked and cleaned and although she did not regularly contribute to the household expenses, occasionally she gave Christian "a couple of dollars." She had just gotten a job at McDonald's but had not started yet when she was arrested. Brown anticipated that she would contribute to the household expenses when she started working.

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[4] Sergeant Zelinsky was not able to track down the deputy and his department had not received any reports of any similar incident.

On November 12, 2012, in the morning, Brown noticed Christian was in pain. They started arguing soon after she told him to go see a doctor. When Brown called Christian stupid for drinking when the doctor told him not to, Christian swung at her with a closed fist and missed. This provoked Brown and she hit Christian a few times. Christian then hit her two times on the cheek.[5] At some point Christian pulled out a switchblade with a yellow handle from under the bed and threatened her with it.[6] However, he eventually apologized and things calmed down. Brown denied that she ever tried to make Christian flinch by pretending to punch him.

According to Brown, when they left Christian's dorm room they were going to her bank and Christian was going to see a doctor. Christian did not say that they were going to a friend's house. As they drove towards Groveland Brown allowed Christian to borrow her phone to contact the doctor. When he was finished, she asked him for the phone, but instead of giving it to her, he tossed it out of the window and they both began calling each other names.[7] As they continued driving Christian pulled out a switchblade with a yellow handle from the right pocket of his pants or coat and pressed the blade to the left side of her chest. However, she did not feel any pain because the blade pressed against a black puffy jacket she was wearing that cushioned it. As Christian pulled over, Brown grabbed the knife blade to try to break it. She then broke the blade and got out of

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5 Brown did not tell the deputies that Christian had hit her because she was hysterical when she spoke with them.

6 During cross-examination, Brown testified that after she hit Christian in the dorm room he pulled a kitchen knife out from under the bed and that in her earlier testimony she misspoke when she said he pulled out a switchblade.

7 Brown denied having a knife with her in the truck or threatening Christian with one. She also denied doing anything to Christian's phone.

the truck.[8] Brown approached a man who she thought was a sheriff's deputy because he was wearing a black uniform and sitting in a black and white car parked on the other side of the road. With blood gushing from her hand, she told the man that Christian had tried to stab her.[9] The man told Brown he could not help her because he worked in a different department and for her to throw the blade away and get back in the truck.

Brown threw the blade away, got back in the truck and she and Christian turned around and drove back a few miles to look for her phone. Brown denied kicking Christian as they searched for the phone. When an ambulance drove by, it pulled over and Christian got inside.

Brown denied cutting Christian, but she could not explain where he got the cuts on his arms, which she admitted he did not have when they left the dorm room or when he pulled the knife on her in the truck.

Brown denied telling Sergeant Zelinsky that she yelled at Christian and called him names before he swung at her. Brown claimed she did not tell Sergeant Zelinsky about the switchblade because she did not want to get Christian in trouble.

The Prosecution Rebuttal

Christian testified in rebuttal that he did not own a switchblade or a butterfly knife with a yellow handle and he denied ever displaying a knife to Brown.

Deputy Champlin testified that Brown demanded at least four times that Christian be arrested. Additionally, he searched Christian's vehicle thoroughly and did not see any

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8 During cross-examination she testified that Christian first pulled over for no reason and then he pulled out the switchblade from his right pocket and assaulted her with it. When asked if she remembered telling Sergeant Zelinsky they were driving when Christian pressed the knife to her chest, she testified that he pressed the knife against her chest while he was pulling over.

9 According to Brown, the cut healed without leaving a scar on her hand.

jackets in the vehicle or a broken knife handle. Brown did not tell the deputy that a switchblade knife was involved in the assault.

DISCUSSION

The Failure to Charge the Jury with Assault as a Lesser Included Offense of Assault with a Deadly Weapon

Brown contends the court erred by its failure to instruct on simple assault (§ 240) as a lesser included offense of assault with a deadly weapon. We will reject this contention.

> "A trial court has a sua sponte duty to 'instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser.' [Citation.] *Substantial evidence in this context is evidence from which a reasonable jury could conclude that the defendant committed the lesser, but not the greater, offense*. [Citation.] 'The rule's purpose is ... to assure, in the interest of justice, the most accurate possible verdict encompassed by the charge and supported by the evidence.' [Citation.] In light of this purpose, the court need instruct the jury on a lesser included offense *only '[w]hen there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of' the lesser offense*. [Citation.]" (*People v. Shockley* (2013) 58 Cal.4th 400, 403-404, italics added.) """On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense." [Citation.]' [Citation.]" (*People v. Verdugo* (2010) 50 Cal.4th 263, 293.)
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> "'In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "[R]eversal is not warranted unless an examination of 'the entire cause, including the evidence,' discloses that the error produced a 'miscarriage of justice.' [Citation.] This test is not met unless it appears 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred. [Citation.]" (*Id*. at p. 149.)

Assault is a lesser included offense of assault with a deadly weapon. (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 747-748.)

The assault with a deadly weapon charge was based on Brown's attempt to stab Christian while they were both in his truck. Since Brown's only defense to this charge was to deny that she attempted to stab Christian, there was no basis in the record for charging the jury that assault is a lesser included offense of assault with a deadly weapon.

Brown nevertheless contends that Christian's testimony that she would make him flinch by punching to within inches of his face supports the giving of this lesser included offense instruction notwithstanding that she denied doing this. Brown is wrong. Whether or not the jury found that Brown engaged in this latter conduct did not constitute substantial evidence that an element of the assault with a deadly weapon offense was missing. Nor does Brown point to any other evidence in the record that shows that her conduct in attempting to stab Christian was anything less than an assault with a deadly weapon. Accordingly, we conclude that the court did not err by its failure to instruct the jury on simple assault as a lesser included offense of the assault with a deadly weapon.

The Failure to Charge the Jury that Battery is a Lesser Included Offense of Inflicting Corporal Injury on a Cohabitant

Brown contends there was substantial evidence that the relationship between her and Christian was platonic and that they were not cohabitants. Thus, according to Brown, the court prejudicially erred by its failure to charge the jury sua sponte that battery is a lesser included offense of inflicting corporal injury on a cohabitant. We disagree.

Battery is a lesser included offense of inflicting corporal injury on a cohabitant in violation of section 273.5. (*People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952.)

Section 273.5, subdivision (a) provides in pertinent part that a person who willfully inflicts "corporal injury resulting in a traumatic condition" on a "former cohabitant" is guilty of a felony. The cohabitation requirement is interpreted "broadly"; a finding of cohabitation does not require proof of a "'quasi-marital relationship.'" (*People*

v. Moore (1996) 44 Cal.App.4th 1323, 1333.) However, it requires "*something more than a platonic, rooming-house arrangement*." (*People v. Holifield* (1988) 205 Cal.App.3d 993, 999, (*Holifield*), italics added.) "Cohabiting" refers to "an unrelated man and woman living together in a substantial relationship—one manifested, minimally, by permanence and sexual or amorous intimacy." (*Id*. at p. 1000.) Factors relevant to determining cohabitation include: 1. sexual relations between the parties; 2. sharing of income or expenses; 3. joint use or ownership of property; 4. whether the parties hold themselves out as husband and wife; 5. the continuity of the relationship; and 6. the length of the relationship. (*Id*. at p. 1001.)

Here, the evidence was strong, if not overwhelming, that Christian and Brown were involved in more than a "platonic, rooming-house arrangement." Christian had known Brown for seven years since they were both in junior high school. Brown lived with Christian six or more weeks prior to her arrest in this matter, she slept with Christian in the same bed, stored all her clothes and other belongings in his dorm room, and she cooked and cleaned for him. Although Brown generally did not pay for any expenses, she gave him money occasionally, and she had just gotten a job and expected to contribute more. Additionally, Christian testified that they had sexual relations 20 times, including the night before Brown stabbed him, that he was bothered by Brown's flirtatious attitude towards other men, and that he hoped Brown would be his girlfriend. He also told Deputy Champlin that he and Brown had been dating for two months and during that conversation he referred to Brown as his girlfriend. Moreover, Brown admitted that she was intellectually attracted to Christian.

Further, although Brown testified that she did not consider Christian to be her boyfriend and that they had sex only once, there is no requirement that both partners be romantically attached to each other or that they have sex often in order for a cohabiting relationship to exist. (Cf. *Holifield, supra,* 205 Cal.App.3d 993, 996 [cohabitation found

even though victim testified she cared about the defendant and was emotionally attached to him but he did not return her feelings and they had infrequent sex].) Thus, Brown's testimony did not require the court to charge the jury on battery as a lesser included offense of inflicting corporal injury on a cohabitant because it did not negate the cohabitation element of this offense. Alternatively, we conclude that because the record contains strong, if not overwhelming, evidence that Christian and Brown were cohabiting, any error in the court's failure to charge the jury with the omitted battery instruction was harmless.

The Ineffective Assistance of Counsel Claim

Brown contends she was denied the effective assistance of counsel by defense counsel's failure to request instructions on the lesser included offenses discussed in the previous sections. She further contends that because the error deprived her of her federal constitutional right to the assistance of counsel, prejudice must be evaluated under the *Chapman*[10] standard, i.e., reversal is required unless the error was harmless beyond a reasonable doubt. There is no merit to these contentions.

To prevail on a claim of ineffective assistance of counsel on appeal, a defendant must demonstrate that counsel's representation fell below professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687, 695.)

Since we have already determined that the failure to instruct on the lesser included offenses of simple assault and simple battery was not error or, if error, was not prejudicial, we reject Brown's ineffective assistance of counsel claim.[11]

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10 *Chapman v. California* (1967) 386 U.S. 18.

11 In accord with *Strickland*, we also reject Brown's contention that prejudice is evaluated under the *Chapman* standard.

The Omitted Assessments

Respondent contends, and appellant does not dispute, that the court erred by its failure to impose a mandatory court facilities funding assessment fee and a mandatory court security funding assessment. We agree with respondent.

Government Code section 70373, subdivision (a)(1) provides:

> "To ensure and maintain adequate funding for court facilities, an assessment *shall be imposed* on every conviction for a criminal offense, ... The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony ...." (Italics added.)

Penal Code Section 1465.8, subdivision (a)(1) provides:

> "To assist in funding court operations, an assessment of forty dollars ($40) *shall be imposed* on every conviction for a criminal offense, ..." (Italics added.)

Since Brown suffered two convictions in the instant case, the court erred by its failure to order her to pay two $30 assessments pursuant to Government Code section 70373, subdivision (a)(1) for a total of $60 and two $40 assessments pursuant to Penal Code section 1465.8 for a total of $80. Therefore, we will modify the judgment to include these assessments.

DISPOSITION

The judgment is modified to include two assessments pursuant to Government Code section 70373 subdivision (a)(1) for a total of $60 and two assessments pursuant to Penal Code section 1465.8 for a total of $80. The trial court is directed to correct its minute order and order granting probation for appellant's July 16, 2013, sentencing hearing so that it is consistent with this opinion. As modified, the judgment is affirmed.